

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11218 of 1994
with
SPECIAL CIVIL APPLICATION NO.12454 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

C G SHARMA

Versus

STATE OF GUJARAT

Appearance:

SPECIAL CIVIL APPLICATION NO.11218 OF 1994:

MR MB GANDHI for Petitioner

MR SN SHELAT, ADDL. ADVOCATE GENERAL with

Ms MANISHA LAVKUMAR, AGP for Respondent Nos. 1, 2

SPECIAL CIVIL APPLICATION NO.12454 OF 1994:

MR M.J.THAKOR for Petitioner

MR SN SHELAT, ADDL. ADVOCATE GENERAL with

Ms MANISHA LAVKUMAR, AGP for Respondent Nos. 1, 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 06/08/1999

ORAL JUDGEMENT

Both these petitions under Article 226 of the Consitution of India raise common questions of law about interpretation of the provisions of Rule 5 (4) of the Gujarat Judicial Service Recruitment Rules, 1961 regarding the power of the Government to extend the period of probation. Hence, with the consent of the learned counsel for the respective parties, both these petitions have been heard together and are being disposed of by this common judgement.

2 Petitioner of Special Civil Application No.11218 of 1994 (Mr C.G.Sharma) was appointed as Civil Judge (Junior Division) and J.M.F.C. on probation for a period of two years vide Government Notification dated 7.6.1991. The petitioner joined his duties on 29.6.1991. By the order dated 22.9.1994 passed by the State Government in the Legal Department, under the recommendation of the High Court, the petitioner's services were terminated with immediate effect on account of unsuitability for the post held by him. The said order is challenged in Special Civil Application No.11218 of 1994 on various grounds more particularly on the ground that two year period of probation having expired, the petitioner must be deemed to have been confirmed on the post of Civil Judge (Junior Division) and J.M.F.C. and, therefore, the petitiioenr's services could not have been terminated without holding a departmental inquiry. The petitioner also invoked the principle of natural justice by contending that opportunity of hearing should have been afforded to the petitioner before terminating his services. It was also contended that the petitioner had tried to the best of his capacity to dispose of the cases and that many others who had no disposal as per the norms were confirmed in the post but because of the pick and choose approach the petitioner's services came to be terminated.

The petition is resisted by the affidavit-in-reply filed by the Registrar of the High Court pointing out that the petitioner's case was examined by the High Court and having regard to the fact that the overall performance of the petitioner was not satisfactory, the High Court recommended to the State Government on 12.9.1994 to terminate the petitioner's services with immediate effect on account of unsuitability for the post held by him and accordingly the State Government in Legal Department issued the Notification dated 22.9.1994 terminating the petitioner's

services. It is contended that the petitioner remained as a probationer as no order of confirmation was passed. Various factual details are also given in the affidavit-in-reply to show that the petitioner's performance was not satisfactory. Adverse remarks were also communicated to the petitioner and representations made by the petitioner were duly considered and decided. Copies of the decisions dated 26.11.1993, 21.1.1994 and 12.9.1994 communicating the adverse remarks to the petitioner for the relevant period are already annexed to the petition at Annexure-C to Annexure-E. It is further pointed out that the petitioner was originally serving as an Assistant in the establishment of the High Court and upon termination of his services as a Civil Judge (Junior Division) and JMFC he has been taken back on the establishment of the High Court with effect from 27.9.1994.

3 The petitioner in Special Civil Application No.12454 of 1994 (Mr K.H. Bhatt) was appointed as a Civil Judge (J.D.) and JMFC on probation for a period of two years by the Government Notification dated 1.5.1991. The petitioner took over the charge on 17.6.1991. There were adverse remarks in the petitioner's confidential reports for the period from 17.6.1991 to 16.9.1992 which adverse remarks were communicated to the petitioner. The period of probation was extended by one year with effect from 17.6.1993. During the subsequent period also the petitioner was communicated the adverse remarks for the quarters between 15.6.1993 and 15.5.1994. The High Court considered the petitioner's overall performance and on 12.9.1994 recommended to the State Government to terminate the petitioner's services on the ground of unsuitability for the post. The State Government vide notification dated 22.9.1994 terminated the petitioner's services. Special Civil Application No.12454 of 1994 is filed for challenging the said order on the grounds which are similar to the grounds urged in the first petition more particularly the ground that the State Government had no power to extend the period of probation beyond two years stipulated in the relevant rule.

In this petition also the petition is resisted by the affidavit-in-reply filed by the Asst. Registrar of the High Court denying the contentions raised and allegations made in the petition and pointing out that there were adverse remarks against the petitioner and that on an assessment the High Court had in its meeting held on 5.4.1994 found that the overall performance of the petitioner was not satisfactory and that his services should be terminated. The High Court had accordingly

recommended to the State Government on 12.9.11994 and the State Government had accordingly issued the impugned notification dated 22.9.1994 termianting the petitioner's services.

4 At the hearing of these petitions, the learned counsel for the petitioners have concentrated on the legal contention regarding interpretation of the relevant rule and the consequential question about the status of the petitioners as probationers or officers deemed to have been confirmed on the post of Civil Judge (J.D) and JMFC. In view of the material on record in both the petitions, the learned counsel for the petitioners were not in a position to make any effective challenge on the merits of the decision of the respondents to the effect that the petitioners were found unsuitable for the post in question.

5 In exercise of the powers conferred by Article 234 and the proviso to Article 309 to the Constitution of India read with the Government Notification dated 5.9.1959, the Governor of Gujarat, after consultation with the Gujarat Public Service Commission and this Court has made the rules called the GUjarat Judicial Service Recruitment Rules 1961 for regulating the recruitment to the Gujarat Judicial Service which includes Civil Judges (Junior Division) and Judicial Magistrates of the First Class. Rule 5 thereof provides for method of recruitment to Class-II of the Junior Branch i.e. Civil Judge (J.D) and JMFCs by a direct selection. Sub-rule (4) of Rule 5 is the relevant rule which has fallen for interpretation in the present petitions. The same is, therefore, quoted verbatim as under:-

"(4) Unless otherwise expressly provided,
every person appointed under the preceding
sub-rules shall be on probation for a period of
two years and on the expiry of such period, he
may be confirmed if :-
(a) there is a vacancy; and
(b) his work is found to be satisfactory."

6. According to the learned counsel for the petitioners, the aforesaid rule provides the maximum period of probation of 2 years and since the services of the petitioners were continued in service for more than 3 years in each case, the petitioners must be deemed to have been confirmed in service, and therefore, termination of their services after more than 3 years without holding any departmental inquiry under Article 311(2) Constitution was illegal. In support of the said

contention reliance is placed on various decisions of the Apex Court including State of Punjab v. Dharam Singh AIR 1986 SC 1210, AIR 1984 SC 636 and AIR 1997 SC 3269.

7 On the other hand, Mr S.N.Shelat, learned Addl. Advocate General, with Ms Manisha Lavkumar, learned AGP, appearing for the respondent - State of Gujarat and the Registrar of this Court on the administrative side have opposed the petitions and have submitted that the rule in question does not provide for any maximum period of probation and therefore the ordinary and general rule would apply and that in any view of the matter the Rule itself contains an indication that the services could not be treated as confirmed unless a specific order is passed after the expiry of probationary period if there is a vacancy and if the officer's work is found to be satisfactory. The learned counsel have placed reliance on the decisions of the Apex Court in AIR 1980 SC 42 and AIR 1998 SC 1291.

8 By now, a large number of decisions have been rendered by the Apex Court on the question of probationer and deemed confirmation or otherwise and after reviewing almost all the decisions on this question including the recent decision in the case of Dayaram v. State of M.P. in AIR 1997 SC 3269, in the case of Wasim Beg vs. State of U.P., AIR 1998 SC 2191 the Apex Court has laid down as follows:-

Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question.

(1) In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary.

However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the Courts

have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended.

(2) The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period.

9 The rule at hand requires a specific act on the part of the respondents which would result in confirmation of the officer. Admittedly, no order of confirmation was issued by the respondents in case of either of the petitioners. Hence, the case clearly falls in the second category of cases as summarised by the Apex Court in the case of Wasim Beg. Accordingly, therefore, there was no deemed automatic confirmation of the petitioners upon expiry of their probation period of two years. It was, therefore, not necessary for the respondents to hold any departmental inquiry or to give an opportunity of being heard as contemplated by Article 311(2) of the Constitution.

10 In view of the aforesaid clear analysis of the decided cases on the issue under consideration it is not necessary to refer to various other decisions cited by the learned counsel for the parties except the decision of the Apex Court in State of Maharashtra v. Saboji in AIR 1980 SC 42 wherein a similar rule came up for consideration and for the sake of comparison the same is reproduced hereinbelow:-

"Unless otherwise expressly directed, every person appointed in the last foregoing sub-rule shall be on probation for a period of two years and on the expiry of such period he may be confirmed if:-

- (a) there is a vacancy
- (b) his work is found to be satisfactory"

A comparison of the aforesaid rule in

V.R.Saboji's case (supra) with the rule in the present case makes it crystal clear that in all material respects, the two rules are identically worded. In Saboji's case the Apex Court held that the plain meaning of the rule is that there is no automatic confirmation on the expiry of probationary period of two years in the first instance and that on the expiry of the said period and on the fulfillment of the requirement of sub-clauses (a) and (b) a government servant becomes eligible for being confirmed. The Court then observed that the rule in question comes under the ordinary and normal rule that without express provision the government servant will not be taken to have been confirmed to the post in which he was appointed temporarily and/or on probation and that the case is not governed by the exceptional rule like the one which was the subject matter of consideration in the case of State of Punjab v. Dharamsing AIR 1968 SC 1210.

11 The learned counsel for the petitioners, however, submitted that such an interpretation that the probationer will remain a probationer even if the order of confirmation is not passed for a long period would make the rule violative of Article 14 and 16 of the Constitution. This contention was also raised in the case of Saboji (supra) and was negatived in no uncertain terms. This will be clear from the following extracts from para 8 of the judgement:-

"(8) Mr Nariman submitted that if an interpretation were to be given to Rule 4(2)(iv) that it depended upon the sweet will of the appointing authority to confirm a Government servant as and when it liked, then the rule would be violative of Arts. 14 and 16 of the Constitution.

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It was not suggested on behalf of the Government that the confirmation depended on the sweet will and the pleasure of the Government. What was, however, argued was that on the fulfilment of the two conditions mentioned in sub-cl. (a) and (b) of Cl. (iv) of sub-rule (2) of rule 4 of the Rules the Government servant became eligible but there may be several other reasons, administrative or otherwise, which may delay the confirmation. The confirmation can surely be delayed if the suitability of the Government servant has got to be watched further

to decide whether he should be confirmed in the post or not."

12 No other contentions were urged.

13 The petitions are dismissed. Rule is discharged in each of the petitions. There shall be no order as to costs.
